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Internal Revenue Service  
**memorandum**

CC:TL:N-4551-87 (Windfall Profit Tax)  
Br4:JRDomike

date: **2 JUN 1987**

to: Special Trial Attorney, [REDACTED] Region CC: [REDACTED]

from: Director, Tax Litigation Division CC:TL

subject: [REDACTED]

This responds to your request for technical advice dated February 27, 1987. Your request generally concerns the windfall profit tax treatment of payments made as a result of [REDACTED]  
[REDACTED]  
[REDACTED].

FACTS

The windfall profit tax (WPT) issues arise as a result of a proceeding brought against [REDACTED] by the U.S. Department of Energy (DOE), in which [REDACTED] was held liable to make restitution for overcharges (selling as "new" [REDACTED] what should have been sold as lower-priced "old" [REDACTED]).

It appears that for WPT purposes [REDACTED] reported the removal price for the [REDACTED] produced from the [REDACTED] at the price for which the [REDACTED] was sold (\$ [REDACTED] to \$ [REDACTED] per [REDACTED]) rather than the controlled price (\$ [REDACTED] to \$ [REDACTED] per [REDACTED]). [REDACTED] withheld WPT based on the higher price. You anticipate that [REDACTED] will file claims for refund of WPT paid, based on the DOE litigation and restitution payments. In addition, you anticipate that other producers in the unit will also file similar claims for refund based upon the same litigation, although they were not parties to the litigation.

ISSUES

1. Do court-ordered restitution payments made by [REDACTED] reduce the "removal price" of [REDACTED] for windfall profit tax purposes? If so, is the reduction taken into account in the year of removal even though the payment is made during a subsequent taxable period? [REDACTED].00-00; [REDACTED].03-00.

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2. If [REDACTED] excluded the overcharges found by the district court from the removal price reported on its WPT returns for the taxable period in which removal of the [REDACTED] occurred, is an adjustment required to its WPT liability for such taxable period as a result of the payments made by it pursuant to the court decision? [REDACTED].00-00; [REDACTED].03-00.

3. Does I.R.C. § 6511(b)(2) limit the amount of the credit or refund to the portion of the tax paid during the period, immediately preceding the filing of the claim, equal to 3 years plus the period of any extensions of time for filing the return (or to the amount of tax paid within 2 years immediately preceding the filing of the claim), notwithstanding the provisions of section 6511(h)(2)? 6511.09-00.

4. When did the findings of the courts become final for purposes of section 6511(h)(2)? 6511.09-00.

5. In recalculating the WPT liability for the periods in which the overpricing occurred, is the correct tier classification of the [REDACTED] to be used for purposes of determining the correct adjusted base price, severance adjustment, tax rate, etc.? [REDACTED].00-00, 6402.01-00.

6. Are producers who were participants in the unit but not named parties to the litigation entitled to the extended period for filing refund claims provided in section 6511(h)(2)? 6511.01-00.

7. Is the net income limitation computation for the taxable period of removal affected by the restitution payments made during a subsequent taxable period? [REDACTED].02-00 [reserved].

#### DISCUSSION

We requested the views of the Interpretative Division on the issues raised and discussed in your memorandum. That division generally agreed with your proposed conclusions, as do we. The Interpretative Division's proposed O.M. 1/ is attached and incorporated herein by reference. Briefly, the conclusions, and authority therefor, are as follows.

1. The windfall profit tax is an excise tax imposed on the windfall profit from taxable [REDACTED] removed from the premises during each taxable period, and paid by the producer of the [REDACTED]. I.R.C. § [REDACTED]. The windfall profit is the excess of the removal price of the [REDACTED] over the sum of the adjusted base price and the severance tax adjustment. *Id.* § [REDACTED]. In general, the term "removal price" means the amount for which the [REDACTED] is sold. *Id.* § [REDACTED].

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1/ Issue 7, net income limitation, is not included. It will be supplied shortly.

We believe that the restitution of the overcharges in this case is in effect a retroactive price decrease; therefore, [REDACTED]'s WPT liability should be recalculated based on a lower removal price for the [REDACTED]. I.R.C. § [REDACTED](c)(1); Treas. Reg. § 51. [REDACTED]-1(b)(1); see Rev. Rul. 85-17, 1985-1 C.B. 338. However, although the courts ordered [REDACTED] to make full restitution for the overcharges, we agree with your conclusion that any reduction to [REDACTED]'s WPT liability must be limited to overcharges attributable to [REDACTED] owned by [REDACTED]. See Rev. Rul. 84-168, 1984-2 C.B. 308. The reduction in the removal price is taken into account in the year of removal although the payment is made in a subsequent taxable period. (Proposed O.M. at pp. 4-7.)

2. If [REDACTED] did not include the selling price as the removal price initially used in calculating the WPT liability, then presumably the correct removal price was used and no further adjustment would be necessary. (Proposed O.M. at p. 7.)

3. We believe that in situations such as the present case, in which the producer is unable to file a timely claim for refund of WPT because a DOE change does not become final within the time mandated by section 6511(b)(2), section 6511(h)(2) provides an extended period in which the producer may file for a refund of an overpayment of WPT. (Proposed O.M. at 8-9. See also our memorandum to Deputy Regional Counsel (TL), [REDACTED] Region re: Statute of Limitations--Windfall Profit Tax Refund Claims (June 22, 1984), copy attached.)

4. We agree with your conclusion that the findings of the courts became final for purposes of section 6511(h)(2) on [REDACTED], which is 25 days after the date the U.S. Supreme court denied [REDACTED]'s petition for certiorari. (Proposed O.M. at 9; our June 22, 1984 memo, supra.)

5. The extended time for filing a claim for credit or refund is provided by section 6511(h)(2) only with respect to overpayments attributable to a DOE change. In recalculating the WPT liability for the periods in which the overpricing occurred, there must be a determination of the elements of the tax computation that are affected by the DOE change. The correct tier classification of the [REDACTED] should be used for purposes of determining the correct adjusted base price, severance tax adjustment, and tax rate. (Proposed O.M. at 9-10.)

6. The non-party participants in the unit are entitled to the extended time provision of section 6511(h)(2), but only to the extent that they are required to reimburse [REDACTED] the amount of overcharges attributable to their [REDACTED]. (Proposed O.M. at 10-11.)

Your research file is returned herewith.

ROBERT P. RUWE  
Director

By:



ROBERT B. MISCAVICH  
Senior Technician Reviewer  
Branch No. 4  
Tax Litigation Division

Attachments:

Proposed O.M.  
Memo dated June 22, 1984  
Research file

cc: Regional Counsel CC: [REDACTED]  
Deputy Regional Counsel CC: [REDACTED]:TL